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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

GRANT HOUSE, et al.,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Defendants.

TYMIR OLIVER, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, et al.,

Defendants.

No. 4:20-cv-03919-CW
No. 4:20-cv-04527-CW

DEFENDANTS' NOTICE OF MOTION AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO DISMISS THE COMPLAINTS

Date: November 18, 2020
Time: 2:30 p.m.
Courtroom: Courtroom 2, 4th Floor
Before: Hon. Claudia Wilken

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that on November 18, 2020, at 2:30 p.m., or as soon thereafter as the matter may be heard by the Court, at the courtroom of the Honorable Claudia Wilken, Courtroom 2, 4th Floor, United States District Court, 1301 Clay Street, Oakland, California, Defendants National Collegiate Athletic Association, Pac-12 Conference, The Big Ten Conference, The Big 12 Conference, Southeastern Conference, and Atlantic Coast Conference will and hereby do move the Court, pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing both the Plaintiffs' Complaint in *House*, and the Complaint in *Oliver*, with prejudice. This motion to dismiss is brought on the grounds that the claims in the Complaints fail to state a claim against Defendants upon which relief may be granted.

DATED: September 11, 2020

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E-FILING ATTESTATION

I, Beth A. Wilkinson, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Beth A. Wilkinson
BETH A. WILKINSON

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INTRODUCTION

These complaints should feel familiar. In *O'Bannon v. NCAA*, a class of student-athletes challenged NCAA "rules prohibit[ing] student-athletes from being paid for the use of their names, images, and likenesses." 802 F.3d 1049, 1052 (9th Cir. 2015). Now, with the ink barely dry on a subsequent, broader challenge to the NCAA's compensation rules, Plaintiffs in *House* and *Oliver* seek a re-do. Their complaints do not hide this fact—just as in *O'Bannon*, they challenge NCAA "rules that prohibit student-athletes from receiving anything of value in exchange for the commercial use of their NILs." House Compl. ("HC") ¶ 5; Oliver Compl. ("OC") ¶ 5. And they assert that potential future changes to NCAA rules relating to NIL require invalidation of all compensation limits—a claim expressly rejected by the Ninth Circuit in *Alston*. HC ¶¶ 18–20, 211–214; OC ¶¶ 18–20, 192–195; *In re NCAA GIA Cap Antitrust Litig.*, 958 F.3d 1239, 1253 (9th Cir. 2020) ("*Alston*"). No principle of law justifies serial relitigation of the exact same claims.

The Ninth Circuit's recent observation that "[a]ntitrust decisions are particularly fact-bound" cannot save Plaintiffs. HC ¶ 157; OC ¶ 138 (both quoting *Alston*, 958 F.3d at 1253). Plaintiffs' complaints add nothing material to the factual allegations this Court and the Ninth Circuit recently addressed in *Alston*. And Plaintiffs gain nothing from the passage of state legislation concerning NIL licenses by student-athletes, which prompted the NCAA to create a Working Group and begin exploring revisions to its NIL rules. HC ¶¶ 18–20; OC ¶¶ 18–20. The Ninth Circuit considered and rejected this argument, concluding that it was at best "premature." *Id.* at 1259. For good reason: There would truly be no end to the litigation cycle if new antitrust litigation could proceed based on the consideration of possible changes to rules that have already been subject to antitrust litigation.

Further, the "Group Licensing Damages Sub-Class" claim in both *House* and *Oliver* should be dismissed under Rule 12(b)(6) or stricken. Plaintiffs seek "the share of game telecast group licensing revenue that members of the [Group Licensing Damages Sub-Class] would have received absent Defendants' [allegedly] unlawful conduct," HC ¶¶ 23, 250–251; OC ¶¶ 23, 229–230. But individual

participants have no cognizable NIL rights in game broadcasts. Moreover, the complaints do not plausibly allege either the existence of any market for group licensing of student-athletes' NIL rights in broadcasts of games, or how the challenged restraints have significantly harmed competition in such a market.

Last, Plaintiff Oliver's complaint should be dismissed in full. As a former student-athlete, he has no standing to seek an injunction. He also was a member of the *Alston* damages class settlement and released the damages claim he now attempts to bring here.

ARGUMENT

A motion to dismiss under Rule 12(b)(6) must be granted where the pleadings "fail[] to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6); *accord Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (complaint must be dismissed when it fails to "state a claim to relief that is plausible on its face"). In antitrust cases, plausibility is assessed "in light of basic economic principles," *William O. Gilley Enters. v. Atl. Richfield Co.*, 588 F.3d 659, 662 (9th Cir. 2009), and district courts "retain the power to insist upon some specificity in pleading before allowing a potentially massive factual controversy to proceed," *Twombly*, 550 U.S. at 558 (internal quotation marks omitted). Application of these basic principles requires dismissal of both actions in their entireties. It also affords an independent basis for dismissal of the putative Group Licensing Damages Sub-Class claims in both cases, and of the *Oliver* action as a whole.

A. *O'Bannon* And *Alston* Foreclose All Of Plaintiffs' Claims.

House and *Oliver* represent the third attempt to invalidate NCAA rules governing compensation that may be received by student-athletes. This latest attempt—filed just days after the Ninth Circuit's *Alston* decision—is barred by precedent.

There can be no dispute that Plaintiffs are asserting the same claim adjudicated in *O'Bannon*. They challenge the "NCAA's rules that prohibit student-athletes from receiving anything of value in exchange for the commercial use of their NILs." HC ¶ 5; OC ¶ 5. That is virtually identical to how the Ninth Circuit described the claim in *O'Bannon*—as a challenge to "rules [that] prohibit student-

athletes from being paid for the use of their names, images, and likenesses (NILs)." 802 F.3d at 1052; *see also Alston*, 958 F.3d at 1254 (describing *O'Bannon* as a "challenge to restrictions on NIL compensation" seeking "licensing revenue generated from the use of student-athletes' NILs" (internal quotation marks omitted)). The similarities do not end there. For example, the complaints assert that the NCAA has "fix[ed] the amount that student-athletes may be paid for the licensing, use, and sale of their names, images, and likenesses—**at zero**," HC ¶ 11; OC ¶ 11 (emphasis in originals), adopting the very language used by the Ninth Circuit in *O'Bannon*, which described the anticompetitive effects at issue as "the NCAA schools hav[ing] agreed to value the athletes' NILs *at zero*." 802 F.3d at 1071 (emphasis added).

The Ninth Circuit has held that the determination "[w]hether [a] practice[] as found violate[s] the Sherman Act is a question of law, not fact," *Dunn v. Phoenix Newspapers, Inc.*, 735 F.2d 1184, 1186 (9th Cir. 1984), and therefore is binding as a matter of *stare decisis*. The practice that Plaintiffs challenge here—the NCAA's amateurism rules as applied to alleged NIL rights—is identical to the practice challenged in *O'Bannon*. Indeed, the Ninth Circuit in *Alston* described *O'Bannon* in the context of *stare decisis* as addressing "the NCAA's amateurism rules, insofar as they prevented student-athletes from being compensated for the use of their NILs." 958 F.3d at 1254 (quoting *O'Bannon*, 802 F.3d at 1055). Therefore, *O'Bannon* and *Alston* bar all claims asserted in the *House* and *Oliver* complaints.

The relief Plaintiffs seek confirms the point. Plaintiffs "request an injunction permanently restraining . . . [the allegedly] unlawful and anticompetitive agreements to restrict the amount of name, image, and likeness compensation available to Class Members," HC ¶ 22; OC ¶ 22, just as they did in *O'Bannon*, 802 F.3d at 1052–53. Similarly, Plaintiffs explicitly acknowledge the duplicative nature of their putative Group Licensing Damages Sub-Class claim, alleging that in *O'Bannon*, "a group of . . . student-athletes . . . challeng[ed] the NCAA's rules that prevent athletes from receiving a share of the revenue from . . . live game broadcasts." HC ¶ 155; OC ¶ 136.

Yet both this Court and the Ninth Circuit in *O'Bannon* refused to grant such broad-ranging relief. Quite the opposite. Instead, *O'Bannon* validated NCAA rules limiting NIL compensation to student-athletes with a modification to permit student-athletes to receive full cost of attendance athletic scholarships. *See O'Bannon*, 803 F.3d at 1076–79. And in *Alston*, where similar classes of student-athletes challenged the NCAA's amateurism rules and sought "to dismantle the NCAA's entire compensation framework," 958 F.3d at 1247, this Court and the Ninth Circuit again declined such broad relief. *Id.* at 1264 ("Contrary to [plaintiffs' arguments, the district court's] analysis reflects the judgment that limits on cash compensation unrelated to education do *not*, on this record, constitute anticompetitive conduct and, thus, may not be enjoined." (emphasis in original)). In so ruling, the Ninth Circuit specifically reaffirmed the relief ordered in *O'Bannon*, observing that "the district court . . . sought to toe the line that the panel majority drew" and rejecting the argument that courts should "uncap above-COA compensation, regardless whether their NILs have, will, or could generate any revenue that would fund such compensation." *Id*. at 1254. This Court and the Ninth Circuit, in both *O'Bannon* and *Alston*, identified the specific less restrictive alternatives to the NCAA rules, including the existing NIL limits, that the courts regarded as appropriate—and those less restrictive alternatives did not include the NIL modifications now sought by Plaintiffs. The law does not permit Plaintiffs to get a third bite at the same apple.

As flawed as Plaintiffs' injunctive relief claims are, their claims for money damages are even more plainly without merit. Plaintiffs seek money damages purportedly suffered by them and the putative class members over the past four years as a result of the application of the NCAA rules the Ninth Circuit expressly deemed legally valid in *O'Bannon* just five years ago, based on arguments expressly rejected by the Ninth Circuit in *Alston* less than four months ago. Even if Plaintiffs were able to point to some brand new, material factual developments that could legally justify a departure from those decisions for injunctive relief purposes, those developments could not justify the award of money damages for periods before they occurred.

And while Plaintiffs assert that "[a]ntitrust decisions are particularly fact-bound," HC ¶ 157 (quoting *Alston*, 958 F.3d at 1253); OC ¶ 138 (same), they fail to allege any such developments. Plaintiffs do not identify any changes to the rules they are challenging, or to NCAA rules more generally, since *Alston*.[1] And their complaint substantially parrots the factual allegations before the courts in that case, adding nothing that post-dates the Ninth Circuit's *Alston* decision. Plaintiffs thus fail to plausibly advance any developments that would allow *O'Bannon* and *Alston* "to be distinguished on a principled basis." *Alston*, 958 F.3d at 1253.

Plaintiffs' invocation of state legislation and potential NCAA rules modifications likewise provides no basis for ignoring the Ninth Circuit's binding decisions. HC ¶¶ 211–214, 218; OC ¶¶ 192–195, 199. Just months ago, *Alston* considered and rejected these very arguments, calling them "premature" and explaining:

> As it stands, the NCAA has *not* endorsed cash compensation untethered to education; instead, it has undertaken to comply with the FPP Act in a manner that is consistent with *O'Bannon II*—that is, by loosening its restrictions to permit NIL benefits that are "tethered to education." Fed. and State Leg. Working Grp. Report 4 (Oct. 23, 2019). Accordingly, we disagree that the NCAA's response to the FPP Act militates in favor of enjoining all NCAA compensation limits.

958 F.3d at 1265 & n.19 (emphasis in original) (website citation to Working Group Report and citation to Dr. Mark Emmert's testimony omitted). The Working Group Final Report conditions any changes "to permit student-athletes to receive compensation related to NIL" on the requirement that such "compensation is consistent with NCAA values and principles, and with legal precedent."[2] Plaintiffs acknowledge the accuracy of the Ninth Circuit's conclusion, asserting that "it remains unclear whether and what meaningful changes will actually be implemented absent a court order." HC ¶ 217; OC ¶

[1] Plaintiffs' reference to the NIL waiver process, HC ¶¶ 224–227; OC ¶¶ 205–208, does not change the outcome because the rules regarding waivers have not changed. Confirming the point, the examples cited in the complaints date back to 2015 and are largely recycled. *Compare* HC ¶ 226; OC ¶ 207 (Arike Ogunbowale waiver), *with* Rascher Direct Testimony, *Alston*, 14-md-2541, ECF No. 994 ¶ 84.

[2] Ex. A, NCAA Board of Governors Federal and State Legislation Working Group Final Report and Recommendations at 8 (Apr. 17, 2020). The Report is quoted by Plaintiffs in their complaints. *See, e.g.*, HC ¶ 167 n.76; OC ¶ 148 n.75.

198. As the Ninth Circuit held, there is no basis for using hypothetical future action as a basis for current antitrust liability. Further, Plaintiffs' attempt to impose antitrust liability on the NCAA based on its lobbying efforts regarding potential legislative action, HC ¶¶ 218–19; OC ¶¶ 199–200, runs headlong into the established prohibition on such liability. *See E. R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United Mine Works of Am. v. Pennington*, 381 U.S. 657 (1965).

Defendants are currently operating under the injunctions issued by this Court in *O'Bannon* and *Alston*. Given the recency of those lawsuits, there is no basis for permitting yet another challenge to proceed. The complaints in *House* and *Oliver* represent a virtually identical effort to ask, once again, questions that have been answered. This Court should not allow today what it and the Ninth Circuit rejected just yesterday. Both cases should be dismissed.

B. The Court Should Dismiss With Prejudice The Claims Of The Putative Group-Licensing Damages Sub-Classes.

Plaintiffs' "Group Licensing Damages Sub-Class" (the "Sub-Class") claims suffer two additional, separate flaws, either of which independently warrants dismissal under Rule 12(b)(6)—or, alternatively, striking under either Rule 12(f) or Rule 23(d)(1)(D)—and neither of which can be cured by amendment.[3] First, participants have no publicity rights in broadcasts of football or basketball games, precluding Plaintiffs from establishing the requisite injury to their "business or property" under the Clayton Act, 15 U.S.C. § 15(a). Second, even if such rights exist, Plaintiffs cannot establish any

[3] Because Defendants' arguments for dismissal of the putative Sub-Class are based on purely legal deficiencies applicable to the class as a whole, they are properly before the Court under Rule 12(b)(6). Alternatively, the allegations and claim for relief on behalf of this putative Sub-Class should be stricken under either Rule 12(f) or Rule 23(d)(1)(D). *See Nahum v. Boeing Co*., No. 2:19-cv-1114-BJR, 2019 WL 6878242, at *5 (W.D. Wash. Dec. 17, 2019) ("When faced with impermissible demands for relief, the Court will strike them [under Rule 12(f)].") (*citing Bykov v. Rosen*, No. C15-0713-JCC, 2017 WL 5756593, at * 1 (W.D. Wash. Nov. 28, 2017) ("This includes striking any part of the prayer for relief when the relief sought is not recoverable as a matter of law.")); *Lyons v. Bank of Am., NA*, No. C 11-1232 CW, 2011 WL 6303390, at *7 (N.D. Cal. Dec. 16, 2011) (granting motion to strike under Rule 23(d)(1)(D) where a "proposed class include[d] many members who have not been injured").

harm to competition in the relevant market under a straightforward application of this Court's decision in *O'Bannon*.

1. Plaintiffs Have No Publicity Rights In Game Broadcasts.

No claim for violation of the Sherman Act may be maintained in the absence of an injury to "business or property." *See, e.g.*, *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 338–40 (1990). As this Court recognized in *O'Bannon*, to meet that requirement, student-athletes must show they "have cognizable rights of publicity in the use of their names, images, and likenesses in live game broadcasts and archival game footage." *In re NCAA Student-Athlete Name & Likeness Licensing Litig.*, 37 F. Supp. 3d 1126, 1140 (N.D. Cal. 2014) ("*O'Bannon*").

Plaintiffs cannot make such a showing, because those rights do not exist. The decisions of the district court and the Sixth Circuit in *Marshall v. ESPN Inc.* are directly on point. 111 F. Supp. 3d 815, 828 (M.D. Tenn. 2015), *aff'd*, 668 Fed. App'x 155 (6th Cir. 2016). In those cases, Division I college basketball and FBS football student-athletes sued the Conference Defendants (among others), claiming they had violated the antitrust laws by fixing the amount of compensation student-athletes could receive for their NILs in game broadcasts without obtaining an assignment of their publicity rights. *See Marshall*, 111 F. Supp. 3d at 820–22. The district court granted a motion to dismiss that claim, concluding that the plaintiffs "cannot plead any antitrust injury" because they "do not have a right to publicity in sports broadcasts." *Id.* at 834–35. That conclusion flowed from the fact that "virtually all courts in jurisdictions that have decided the matter under their respective laws" have rejected the claim that participants in sporting events have a publicity right to their NIL. *Id.* at 825. The Sixth Circuit affirmed the district court's "notably sound and thorough opinion," including its dismissal of the Sherman Act claim, holding:

> The plaintiffs' case goes downhill from there. Their claim under the Sherman Act is that the various defendants have engaged in a horizontal scheme to fix at zero the price of the plaintiffs' putative rights to license broadcasts of sporting events in which the plaintiffs participate. That claim is meritless because, as shown above, those putative rights do not exist.

668 Fed. App'x at 157.

Marshall correctly observed a judicial consensus on this point: For almost a century, judicial decisions and state statutes have uniformly recognized that the right to license an event vests exclusively in the promoter or producer of the event. Courts have viewed the broadcast right as an exclusive property right for producers. *See Wisc. Interscholastic Athletic Ass'n v. Gannett Co.*, 658 F.3d 614, 624–28 (7th Cir. 2011) ("[T]he producer of entertainment is entitled to charge a fee in exchange for consent to broadcast."). Early cases recognized that just as the producer of an event may place conditions upon access to the event, so too may the producer grant permission to broadcast the game to only one, or to a limited number, of broadcasters. *See, e.g.*, *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490, 492–93 (W.D. Pa. 1938) (holding that Pittsburgh Pirates had a "property right" to "sell[] exclusive broadcasting rights"); *Twentieth Century Sporting Club, Inc. v. Transradio Press Serv., Inc.*, 165 Misc. 71, 73 (N.Y. Sup. Ct. 1937). The caselaw over the past 75 years has developed uniformly, and it has long been settled that the producer of the event owns the broadcast rights. *See, e.g.*, *SW. Broad. Co. v. Oil Ctr. Broad. Co.*, 210 S.W.2d 230, 232 (Tex. Civ. App. 1947) ("The right [of the producer] to broadcast a description of the action of an athletic contest is a valuable right. It has and should be protected by injunction."); *Okla. Sports Props., Inc. v. Indep. Sch. Dist. No. 11 of Tulsa Cnty., Okla.*, 957 P.2d 137, 139 (Okla. Civ. App. 1998); *Post Newsweek Stations-Conn., Inc. v. Travelers Ins. Co.*, 510 F. Supp. 81, 85–86 (D. Conn. 1981). The fundamental precept of ownership rights reflected in these cases forms the legal foundation for the sports broadcasting industry.

Consistent with this precedent vesting rights to license a broadcast exclusively in the producer of an event, numerous cases hold that participants have no publicity rights in the broadcast. *See, e.g.*, *NFL v. Alley, Inc.*, 624 F. Supp. 6, 10 (S.D. Fla. 1983); *Gionfriddo v. Major League Baseball*, 114 Cal. Rptr. 2d 307, 313–19 (Cal. Ct. App. 2001); *Dora v. Frontline Video, Inc.*, 18 Cal. Rptr. 2d 790, 792 (Cal. Ct. App. 1993); *Gautier v. Pro-Football, Inc.*, 107 N.E.2d 485, 488–89 (N.Y. 1952); *Baltimore Orioles, Inc. v. Major League Baseball Players Ass'n*, 805 F.2d 663, 671–73 (7th Cir. 1986) (holding

publicity rights preempted by Copyright Act, and not reaching state law issue). That is true in cases involving sporting events for the additional reason that the broadcasts are matters of public interest. Individuals have no publicity rights in broadcasts of a "public affair[]" or matter of "public interest"—which are not limited to "topics that might be covered on public television or public radio" but rather have been broadly construed to encompass "subjects that do not relate to politics or public policy, and may not even be important, but are of interest" to the public. *Dora*, 18 Cal. Rptr. 2d at 794–95 (finding that even if a surfer was unaware that video of him was being used in a surfing documentary, the public affairs standard defeated his publicity right claim because "surfing is of more than passing interest to some" and "has also had a significant influence on the popular culture"). That standard is clearly met here, as Plaintiffs themselves acknowledge. *See, e.g.*, HC ¶¶ 12–13, 16; OC ¶¶ 12–13, 16. Simply put, Plaintiffs cannot have been "injured by a purported conspiracy to deny them the ability to sell non-existent rights." *Marshall*, 111 F. Supp. 3d at 835.

This Court's summary judgment decision in *O'Bannon* does not justify a different outcome. There, the Court concluded that any First Amendment rights of broadcasters would not override any rights of publicity of student-athletes—an observation that did not disturb the general rule that only producers of an event have the right to license it. *O'Bannon*, 37 F. Supp. 3d at 1140–45. It then permitted the plaintiffs' claims to proceed because they might have a right of publicity under Minnesota law "to recover for the unauthorized use of their names and images in at least certain kinds of broadcast footage," based on a decision on a preliminary motion for judgment on the pleadings by the court in *Dryer v. NFL*, 689 F. Supp. 2d 1113, 1123 (D. Minn. 2010).[4] *O'Bannon*, 37 F. Supp. 3d at 1145. Subsequent to this Court's decision in *O'Bannon*, however, the *Dryer* court clarified that the NFL's use of game video did not violate the publicity rights of the players under Minnesota law or under the laws of any of the other states at issue (New York, New Jersey, California, or Texas). *See*

[4] On appeal, the Ninth Circuit chose not to address the issue of publicity rights in game broadcasts, instead basing its holding on a separate line of Ninth Circuit precedent establishing publicity rights in video games. *See* 802 F.3d at 1067.

Dryer v. NFL, 55 F. Supp. 3d 1181, 1195–99 (D. Minn. 2014). In reaching this explicit conclusion, the *Dryer* court invoked the same principles applied in the cases discussed above. *See id.* Defendants know of no court decision or statute that supports the existence of a right of publicity in a game broadcast.[5]

This Court also cited *Zacchini v. Scripps-Howard Broadcasting Co*., 433 U.S. 562 (1977), in *O'Bannon*, but it does not support the claims that Plaintiffs seek to assert here on behalf of the Sub-Class. The Supreme Court's decision in *Zacchini* held there was no First Amendment right to broadcast an entire game or performance, but that "does not mean that it correspondingly establishes a right to publicity by the athletic participants when entire games are broadcast." *Marshall*, 111 F. Supp. 3d at 828. Instead, the decision in *Zacchini* is fully consistent with the long line of cases described above holding that the producer of an event controls the broadcast rights for the event. As the *Marshall* court noted, Mr. Zacchini—the "human cannonball"—"was not only a performer, he was also the producer of his one-man show." *Id.* at 828–29 (citing 433 U.S. at 576). He held the exclusive right to broadcast the performance as its *producer*, not as a participant. *Zacchini* did not go further and "establish[] a right to publicity by the athletic participants when entire games are broadcast." *Marshall*, 111 F. Supp. 3d at 828.

In short, every court decision that has squarely addressed the issue has held that broadcasts of sporting events do not implicate publicity rights or require releases of publicity rights from the participants. As the Sixth Circuit observed in *Marshall*, there is no support for the "assertion that college football and basketball players have a property interest in their names and images as they appear in television broadcasts of games in which the players are participants." *Marshall v. ESPN*,

[5] In fact, the final NCAA Board of Governors report Plaintiffs cite in the complaints as support for their claims, HC ¶ 214; OC ¶ 195, notes "[c]ourts have repeatedly held that neither broadcasting a sporting contest, nor advertising or promoting those broadcasts by using the participants' names or images, violates the publicity rights of the participants." Ex. 1 at 10. The report also notes that "student-athletes, like other participants in sporting contests, generally have no legal right to prohibit the broadcast or sale of images that are captured while they are playing their sports, or in many other situations associated with their athletics participation." *Id.*

668 Fed. App'x 155, 156 (6th Cir. 2016). In the complete absence of any legal basis for assertion of publicity rights in broadcasts, the claims of the Sub-Class should be dismissed, with prejudice.

2. Plaintiffs Have Also Failed To Allege A Cognizable Harm To Competition In A Group Licensing Market.

Even if student-athletes had rights of publicity in connection with the use of their NILs in game telecasts, the Group Licensing Damages Sub-Class claim should be dismissed because it is devoid of essential allegations that must be made to state an antitrust claim but cannot plausibly be alleged here. Specifically, to survive the pleading stage, a plaintiff must allege that the restraint in question produces "significant anticompetitive effects within a relevant market." *Tanaka v. Univ. of S. Cal.*, 252 F.3d 1059, 1064 (9th Cir. 2001) (dismissing complaint for failure to so allege).

The complaints here contain neither allegations of the existence of a market featuring buyers and sellers of group licenses for student-athlete rights of publicity in television broadcasts of games, nor allegations of how the challenged NCAA rules purportedly hinder competition in such a market. The complaint instead focuses on the "nationwide market for the labor of NCAA Division I college athletes" wherein all Division I student-athletes compete for individual roster spots supplied by NCAA Division I member institutions. HC ¶ 81; OC ¶ 63. Those allegations reveal nothing about a group licensing market, or how competition among unidentified buyers and sellers in that purported market has been significantly harmed. *See Twombly*, 550 U.S. at 570 (requiring dismissal of a complaint that fails to "state a claim to relief that is plausible on its face"); *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss.").

That pleading failure is not just a technical omission: This Court's ruling in *O'Bannon* makes such allegations implausible. As noted in the prior section, this is the second time the same group licensing claim for a share of game telecast revenue has been presented to this Court. After a full trial on the same rules challenged here, this Court concluded not only that the student-athletes had "failed to show that the challenged rules hinder competition among any potential buyers or sellers of group licenses," but that "the evidence in the record strongly suggests that . . . teams of student-athletes would

never actually compete against each other as sellers of group licenses, even if the challenged NCAA rules no longer existed." *O'Bannon v. NCAA*, 7 F. Supp. 3d 955, 995 (N.D. Cal. 2014). Because "[a]llowing student-athletes to seek compensation for group licenses would not increase the number of television networks in the market or otherwise enhance competition among them," the Court concluded that Plaintiffs "failed to show that the challenged NCAA rules harm competition." *Id.* at 996–97. Plaintiffs here allege nothing supporting a different outcome.

Nor could they, so dismissal with prejudice is warranted. *Zixiang Li v. Kerry*, 710 F.3d 995, 999 (9th Cir. 2013). Plaintiffs do not write on a clean slate but against the backdrop of this precise claim having previously failed before this Court. The Ninth Circuit has advised that courts must measure a complaint's factual allegations not in isolation but in light of previous judicial decisions. *See In re Century Aluminum Co. Secs. Litig.*, 729 F.3d 1104, 1106–08 (9th Cir. 2013) (factual allegations failed to satisfy *Iqbal*'s plausibility requirement in light of prior cases on the same subject matter). Thus, any new allegations Plaintiffs might assert would have to be read in the context of this Court's prior analysis in *O'Bannon*, which concluded that the student-athlete plaintiffs there did "not identif[y] any harm to competition in [the group licensing] submarket." 7 F. Supp. 3d at 994. Given this Court's prior experience in *O'Bannon*, the plausibility bar for the group licensing claim is one Plaintiffs cannot meet, and the group licensing claim should be dismissed for that reason as well.

C. The Court Should Dismiss *Oliver* Because The Named Plaintiff Cannot Obtain The Relief He Requests.

Plaintiff Tymir Oliver was a full scholarship student-athlete who played football at the University of Illinois from 2016 to 2019. OC ¶¶ 27, 29–30. As a former student-athlete, he has no standing to seek an injunction changing NCAA rules. And as a member of the *Alston* Division I FBS Football Settlement Class, he has released his claims for damages. Because each claim he asserts is flawed, his entire action should be dismissed with prejudice. *Perron v. Hewlett-Packard Co.*, No. 10-CV-00695-LHK, 2011 WL 1748431, at *5 (N.D. Cal. May 6, 2011) (because pre-certification putative class action consists only of the plaintiff's individual claims, dismissal of complaint with prejudice

pursuant to Fed. R. Civ. P. 12(b)(6) was required where prior class action settlement extinguished plaintiff's claims); *Lu v. AT&T Servs., Inc.*, No. C 10-05954 SBA, 2011 WL 2470268, at *1 (N.D. Cal. June 21, 2011) (former employee's class action claims against employer dismissed under Rule 12(b)(6) where employee had previously released claims in his severance agreement); *Skilstaf, Inc. v. CVS Caremark Corp.*, No. C 09-02514 SI, 2010 WL 199717, at *5 (N.D. Cal. Jan. 13, 2010) (dismissing named plaintiff's claims due to covenant in prior settlement agreement not to sue).

1. Oliver Lacks Standing To Seek Injunctive Relief.

Because Oliver is a *former* student-athlete, OC ¶ 27, he lacks standing to obtain an injunction against enforcement of the challenged NIL rules, OC ¶ 22. Oliver is no longer bound by those rules. Nor is there any prospect that Oliver would become a Division I student-athlete again in the future. Because Oliver cannot benefit from the injunctive relief he seeks, he has no standing to assert a claim for injunctive relief, and the claim must be dismissed. *See B.C. v. Plumas Unified Sch. Dist.*, 192 F.3d 1260, 1264 (9th Cir. 1999) (former student lacked standing to seek injunctive relief because no risk of harm in the future); *see also Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 364–65 (2011) (plaintiffs no longer working for defendant had no claim for injunctive relief concerning employment practices); *Bayer v. Neiman Marcus Grp., Inc.*, 861 F.3d 853, 865 (9th Cir. 2017) (former employee's injunctive relief claim was moot for inability to show he could reasonably expect to benefit from the injunctive relief sought).

2. Oliver Released His Damages Claims In The *Alston* Settlement.

Oliver's requests for damages on behalf of a Social Media Damages Sub-Class and a Group Licensing Damages Sub-Class, OC ¶ 23, are barred by the release he signed in connection with the *Alston* settlement. There is no question that Oliver was a member of the Division I FBS Football Class as defined in the *Alston* settlement agreement. That Class included "[a]ll current and former NCAA Division I Football Bowl Subdivision ('FBS') football student-athletes who, at any time from March 5, 2010 through the date of Preliminary Approval of this Settlement [March 21, 2017], received from an NCAA member institution for at least one academic term . . . a Full Athletics Grant-In-Aid." *Alston*

Order & Final Judgment, 14-md-2541-CW, ECF No. 746 at 2; *accord Alston* Settlement Agreement, 14-md-2541, ECF No. 560-1 ¶ A.1(d). Oliver is a former "Division I student-athlete who competed for the University of Illinois men's football team" beginning in 2016. OC ¶¶ 27, 29. And he received a full athletic scholarship from the University of Illinois. *Id.* ¶ 29.

In exchange for settlement payments, Oliver and the other Division I FBS Football Class members released the following claims:

> [A]ny and all past, present and *future claims*, demands, rights, actions, suits, or causes of action, *for monetary damages of any kind* (including but not limited to actual damages, statutory damages, and exemplary or punitive damages), whether class, individual or otherwise in nature, known or unknown, foreseen or unforeseen, suspected or unsuspected, asserted or unasserted, contingent or non-contingent, under the laws of any jurisdiction, which Releasors or any of them, whether directly, representatively, derivatively, or in any other capacity, ever had, now have or hereafter can, shall or may have, *arising out of or relating in any way to any of the legal, factual, or other allegations made in Plaintiffs' Actions, or any legal theories that could have been raised on the allegations in Plaintiffs' Actions*. The Released Claims do not include claims solely for prospective injunctive relief and certain other claims expressly excluded from the release as set forth in the Settlement Agreement.

Order & Final Judgment at 11–12 (emphases added) (footnote omitted)[6]; *id.* at 12 (permanently enjoining class members from prosecuting any Released Claim and noting *res judicata* effect of the release); *see also Alston* Settlement Agreement ¶ A.1(x) (defining "Released Claims" to include "any and all past, present and future claims, demands, rights, actions, suits, or causes of action, for money damages of any kind . . . arising out of or relating in any way to any act or omission of the Releasees

[6] Paragraph 12 enumerates four categories of claims not subject to the release, including: (1) claims for prospective injunctive relief, including the claims that proceeded to trial in *Alston*; (2) claims then-currently asserted in specified pending actions, including *O'Bannon*; (3) personal injury claims, including concussion-related claims against the NCAA or any conference or member school; and (4) any claims to enforce the terms of the agreement. *Alston* Settlement Agreement ¶ 12. The reference to *O'Bannon* in the Settlement Agreement's carveout of pending actions preserves none of Oliver's claims here for two reasons. First, Oliver was not a member of the *O'Bannon* class, which was limited to then-"current and former student-athletes" whose claims were finally adjudicated when the mandate issued on December 28, 2015, Case No. 09-cv-3329, Dkt. 463, before Oliver started in 2016, OC ¶ 29. Second, the carveout was limited to the claims on appeal in Case No. 16-15803, the dispute regarding Plaintiffs' attorneys' fee award.

(or any of them) that is alleged in Plaintiffs' Actions or could have been alleged in Plaintiffs' Actions"). Oliver's damages claims here fall within this release: They are claims "for monetary damages" that "aris[e] out of" the same universe of allegedly anticompetitive NCAA rules regulating student-athletes' compensation that were the subject of "Plaintiffs' Actions" in *Alston*.

And Oliver's claims in this action and in *Alston* are based on an "identical factual predicate," as required by Ninth Circuit precedent. *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 748 (9th Cir. 2006); *Howard v. Am. Online, Inc.*, 208 F.3d 741, 746 (9th Cir. 2000) (district court properly dismissed RICO claims where alleged pattern of racketeering activity was same activity giving rise to previously settled claims). The decision in *Reyn*'s is instructive. The class action plaintiffs in that case (a group of merchants) claimed that the defendant banks had engaged in a price-fixing conspiracy to increase the fees they collect on credit-card transactions. 442 F.3d at 744–45. In response, the defendants argued those claims were released in an earlier class action settlement involving a variety of antitrust claims in the debit-card market involving conduct that allegedly "raised the . . . fees in both the debit-card and credit-card markets." *Id.* at 748. The Ninth Circuit concluded the claims had been released, because the class action settlement "was predicated on" the same theory of harm. *Id.* at 749. While the *Reyn's* plaintiffs articulated "a different theory of anti-competitive conduct, the price-fixing predicate . . . and the underlying injury are identical." *Id.*

This case presents an even more straightforward case for preclusion. Oliver advances the exact same theory of injury and harm as in *Alston*: that NCAA rules limited the compensation he could receive. *Compare* OC ¶ 4 (challenging the NCAA's regulation of "the compensation and benefits that athletes may receive while participating in college sports"), *with Alston* Findings of Fact & Conclusions of Law, No. 14-md-2541 CW, ECF No. 1162 at 1 (describing challenge to the "interconnected set of NCAA rules that limit the compensation [plaintiffs] may receive in exchange for their athletic services"); *Alston*, 958 F.3d at 1247 (plaintiffs in *Alston* "sought to dismantle the NCAA's entire compensation framework"). Even if Oliver were understood to articulate "a different theory of anti-competitive conduct," or a challenge to a narrower set of rules, that would not take his

claims outside the scope of the release. *Reyn's*, 442 F.3d at 749; *Nichols v. Citibank, N.A.*, 715 Fed. App'x 681, 682 (9th Cir. 2018) (class action settlement covering "a broader range of alleged misconduct" relating to overtime wage claims barred subsequent suit narrowly focusing on a specific method of miscalculating wages).[7]

[7] As noted in the Order and Final Judgment (*see supra* at 14), Oliver's claims are also precluded by operation of *res judicata*, which applies here because there exists (1) an identity of claims, (2) final judgment on the merits, and (3) identity between parties. *Amalfitano v. Google Inc.*, No. 14-cv-00673-BLF, 2015 WL 456646, at *2–3 (N.D. Cal. Feb. 2, 2015) (granting 12(b)(6) motion to dismiss complaint because *res judicata* barred plaintiff from re-litigating claims resolved in a prior class action in which he was a member).

CONCLUSION

The Court should dismiss the *House* and *Oliver* complaints with prejudice.

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Respectfully submitted.

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E-FILING ATTESTATION

I, Beth A. Wilkinson, am the ECF User whose ID and password are being used to file this document. In compliance with Civil Local Rule 5-1(i)(3), I hereby attest that each of the signatories identified above has concurred in this filing.

/s/ Beth A. Wilkinson
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